(1)

Supreme Court, U.S.
FILED

No. 96 520 OCT 2 1996

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DAVID L. SMITH,

Petitioner,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

QUESTIONS PRESENTED FOR REVIEW

Whether by issuing his orders imposing immediately payable attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith, Judge Nottingham, who is demonstrably biased, engaged in judicial misconduct which deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.

Whether Mr. Smith was therefore entitled, as a matter of Fifth Amendment due process of law, to have his appeal of this judiial misconduct heard and decided by a fair and imartial court of appeals.

Whether because of its previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith, and its refusal to provide a statement of reasons, addressing the issues raised and briefed on appeal, for its order and judgment affirming the orders issued by Judge Nottingham imposing immediately payable attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith, the Tenth Circuit's fairness and impartiality might reasonably be questioned.

Whether the Tenth Circuit was therefore obligated to disqualify itself from the case pursuant to 28 U.S.C. § 455(a).

Whether by failing or refusing to disqualify itself from the case, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.

Whether the Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Nottingham, as to call for the exercise of the Supreme Court's power of supervision.

Whether Judge Nottingham committed reversible error, abused his discretion or otherwise acted contrary to the fair and impartial administration of justice by issuing his order requiring Mr. Smith to pay the harsh and unjustified sanctions previously imposed against him, even though these sanctions have already been paid as a part of the consideration for the settlement of the case.

Whether Judge Nottingham has placed Mr. Smith in the position of having to obey a transparently invalid order to pay harsh and unjustified sanctions or run the risk of being cited for contempt or charged with a disciplinary violation.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DAVID L. SMITH,

Petitioner,

v.

LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

David L. Smith hereby files his petition for a writ of certiorari:

OPINIONS BELOW

Order issued by the United States Court of Appeals for the Tenth Circuit on November 29, 1993 suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado.

Order issued by the Tenth Circuit on February 13, 1996 disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order.

Order issued by the Tenth Circuit on February 16, 1996 affirming the order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order.

Order and judgment issued by the Tenth Circuit on June 12, 1996 affirming the orders issued by United States District Judge Edward W. Nottingham imposing attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith.

Order issued by the Tenth Circuit on August 8, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (June 12, 1996) order and judgment.

Order issued by Judge Nottingham on August 19, 1996 requiring Mr. Smith to pay the harsh and unjustified sanctions previously imposed against him, even though these sanctions have already been paid as a part of the consideration for the settlement of the case.

JURISDICTION

28 U.S.C. § 1254 is the statute believed to confer jurisdiction on the Supreme Court of the United States to review this case on certiorari.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED IN THE CASE

The Fifth Amendment to the Constitution of the United States provides:

> . . . [N]or shall any person be . . . deprived of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

On November 29, 1993, the United States Court of Appeals for the Tenth Circuit issued its order suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado. See In re David L. Smith, 10 F.3d 723 (10th Cir. 1993), cert. denied, ____ U.S. ____, 115 S.Ct. 53, 130 L.Ed.2d 13, (1994). Mr. Smith may apply for readmission to the Tenth Circuit bar when he can

demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied. Id.

On February 13, 1996, the Tenth Circuit issued its order disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order. See In re: David L. Smith, 76 F.3d 335 (10th Cir. 1996). Mr. Smith's petition for a writ of certiorari contesting, on Fifth Amendment due process grounds, the validity of this disbarment order is currently pending in this Court.[1] See In re: David L. Smith, No. 96-212 (filed on August 6, 1996).

On February 16, 1996, the Tenth Circuit issued its order affirming the disciplinary order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order. Mr. Smith may apply for readmission to the District Court bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied. Mr. Smith's petition for a writ of certiorari contesting, on

[1]The Tenth Circuit disbarred Mr. Smith from the practice of law in the Tenth Circuit without giving him the evidentiary hearing required by Fed. R. App. P. 46.

Fifth Amendment due process grounds, the validity of the Tenth Circuit's (February 16, 1996) order is currently pending in this Court.[2] See IN THE MATTER OF DAVID L. SMITH, No. 96-244 (filed on August 13, 1996).

On June 12, 1996, the Tenth Circuit issued its order and judgment affirming the orders issued by United States District Judge Edward W. Nottingham imposing attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith, who raised and briefed the following issues on appeal:

> (1) Whether Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $4,541.25, and other harsh and unjustified sanctions, against Mr. Smith because of his and his client's refusal to sign the burdensome, oppressive and unconstitutionally overbroad confidentiality order proposed by opposing counsel.

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[2]The Tenth Circuit refused to reverse the District Court's (February 10, 1995) disciplinary order indefinitely suspending Mr. Smith from the practice of law in the District Court, which was issued on the basis of the Tenth Circuit's (November 29, 1993) order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit, even though the Tenth Circuit's (November 29, 1993) order was issued without giving Mr. Smith the evidentiary hearing required by Fed. R. App. 46.

(2) Whether Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $1,870.93, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing a meritorious motion for reconsideration of a magistrate-judge's ruling on a discovery matter.

(3) Whether Judge Nottingham abused his discretion or otherwise acted improperly by refusing to recuse himself from the case pursuant to 28 U.S.C. § 455(a), where his impartiality might reasonably be questioned under all the circumstances of the case.

(4) Whether Judge Nottingham abused his discretion or otherwise acted improperly by addressing Mr. Smith's client directly and accusing Mr. Smith of incompetence and unprofessional behavior, in an attempt to induce or intimidate his client into firing him as her attorney, or to otherwise interfere with their attorney-client relationship.

(5) Whether Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $18,085.83, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing alleged "frivolous" appeals of his (Judge Nottingham's) immediately payable sanction orders.

(6) Whether Judge Nottingham abused his discretion or otherwise acted improperly by applying D.C.COLO.LR 83.6P. (which is unconstitutional on its face) to stay Mr. Smith's client's civil rights case and to vacate her jury trial date "pending resolution of Plaintiff's counsel's status."

(7) Whether Judge Nottingham abused his discretion or otherwise acted improperly by refusing to dismiss the case on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the sanctions imposed against Mr. Smith would be vacated and/or dismissed with prejudice nunc pro tunc to the date of their imposition.

However, the Tenth Circuit refused to provide a statement of reasons, addressing the issues raised and briefed on appeal, for its (June 12, 1996) order and judgment.

On August 19, 1996, Judge Nottingham issued his order requiring Mr. Smith to pay the harsh and unjustified sanctions previously imposed against him, even though these sanctions have already been paid as a part of the consideration for the settlement of the case. Mr. Smith's appeal contesting the validity, on Fifth Amendment due process grounds, of Judge Nottingham's (August 19, 1996) order is currently pending in the Tenth Circuit. See Dunkin v. Louisiana-Pacific Corporation, et al., No. _____ (filed on August 29, 1996).

ARGUMENT

By issuing his orders imposing immediately payable attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith, Judge Nottingham, who is demonstrably biased, engaged in judicial misconduct which deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.[3] Mr. Smith was therefore entitled, as a matter of Fifth Amendment due process of law, to have his appeal of this judicial misconduct heard and decided by a fair and impartial court of appeals. See Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decisionmaker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for

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[3]The harsh and unjustified sanctions imposed against Mr. Smith by Judge Nottingham were part of the alleged basis for suspending and disbarring Mr. Smith from the practice of law in the Tenth Circuit and in the District Court.

reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). However, because of its previous orders and judgments imposing harsh and unjustified sanctions and discipline against Mr. Smith, and its refusal to provide a statement of reasons, addressing the issues raised and briefed on appeal, for its order and judgment affirming the orders issued by Judge Nottingham imposing immediately payable attorney fees and costs of approximately $25,000.00, and other harsh and unjustified sanctions, against Mr. Smith, the Tenth Circuit's fairness and impartiality might reasonably be questioned. Id. The Tenth Circuit was therefore obligated to disqualify itself from the case pursuant to 28 U.S.C. § 455(a).

By failing or refusing to disqualify itself from the case, the Tenth Circuit again deprived Mr. Smith of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. The Tenth Circuit also so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such procedure by Judge Nottingham, as to call for the exercise of the Supreme Court's power of supervision.

Judge Nottingham committed reversible error, abused his discretion or otherwise acted contrary to the fair and impartial administration of justice by issuing his

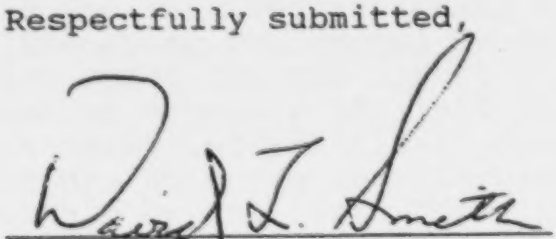
BEST AVAILAB

order requiring Mr. Smith to pay the harsh and unjustified sanctions previously imposed against him, even though these sanctions have already been paid as a part of the consideration for the settlement of the case. Judge Nottingham has placed Mr. Smith in the position of having to obey a transparently invalid order to pay harsh and unjustified sanctions or run the risk of being cited for contempt or charged with a disciplinary violation.

V. CONCLUSION

Mr. Smith requests this Court to grant his petition for a writ of certiorari, and such other and further relief as may be just under the circumstances, including an order declaring the orders imposing harsh and unjustified sanctions and discipline against him void ab initio.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, #300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

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APPENDIX

Order issued by the United States Court of Appeals for the Tenth Circuit on November 29, 1993 suspending Mr. Smith from the practice of law in the Tenth Circuit until he pays more than $50,000.00 in harsh and unjustified sanctions imposed against him by the Tenth Circuit and by the United States District Court for the District of Colorado A-1

Order issued by the Tenth Circuit on February 13, 1996 disbarring Mr. Smith from the practice of law in the Tenth Circuit based on his alleged violation of its (November 29, 1993) suspension order A-4

Order issued by the Tenth Circuit on February 16, 1996 affirming the order issued by the United States District Court for the District of Colorado on February 10, 1995 imposing "simultaneous and identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit in its (November 29, 1993) suspension order A-8

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Order issued by the Tenth Circuit on August 8, 1996 denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc of its (June 12, 1996) order and judgment A-41

Order issued by Judge Nottingham on August 19, 1996 requiring Mr. Smith to pay the harsh and unjustified sanctions previously imposed against him, even though these sanctions have already been paid as a part of the consideration for the settlement of the case A-46

United States Court of Appeals
for the Tenth Circuit

	)	[November 29, 1993]
In re:	)	
	)	No. 93-631
David L. Smith	)	

Order

Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United

States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ___ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is

suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the Court
Per Curiam

United States Court of Appeals
for the Tenth Circuit

	)	[February 13, 1996]
In re:	)	
	)	No. 93-631
David L. Smith	)	
	)	

Order

Before Seymour, Chief Judge,
Baldock and Brorby, Circuit Judges

On December 14, 1995, this panel entered an order requiring respondent David L. Smith to show cause why he should not be disbarred for violating this court's November 1993 suspension order and for practicing in this court without authorization. On December 20, Mr. Smith filed his response. In ruling in this matter, the court has carefully reviewed that response, as well as the other pleadings filed to date in this disciplinary action. The court has determined that Mr. Smith's transgressions warrant disbarment.

Mr. Smith's name was referred for attorney discipline after more than one panel of this court determined he was filing frivolous appeals and failing to pay court ordered sanctions. Following briefing and oral argument, this panel suspended Mr. Smith from practicing in the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993)(per curiam), cert. denied, 115 S.Ct.

53 (1994). Approximately one year later, Mr. Smith filed a request for reinstatement. This panel denied that request. See Order Denying Reinstatement, No. 93-631, (10th Cir. July 18, 1995).

During the course of his suspension, Mr. Smith continued to file briefs in this court. In particular, the court has identified four appeals in which Mr. Smith appears to have drafted briefs on behalf of the allegedly pro se appellants. Those appeals are 94-1127, Qualls v. Regional Transportation District, 94-1130, Dunkin v. Louisiana-Pacific Corporation, 94-1317, Howard v. Mail-Well Envelope Company, and 95-1198, Seales v. Jefferson County School District R-1. The December 14 show cause order was the culmination of this court's efforts to have Mr. Smith explain his involvement in these appeals.

In his response, Mr. Smith readily admits, as he has before, that he wrote and submitted the briefs in this court following the issuance of our suspension order. He maintains, however, that those submissions are not in violation of this court's order because he signed two of the briefs in question and included footnotes admitting his involvement in the other two. He suggests that these admissions absolve him of any allegations of "ghost-writing." See Johnson v. Board of County Commrs., 868 F. Supp. 1226, 1231-32 (D. Colo. 1994)(discussing elements of ghost-writing). The argument follows that because he admits his assistance, he cannot be subject to discipline. Mr. Smith's arguments misperceive the nature of the problem.

Mr. Smith was advised, in very clear terms, that he no longer had permission to practice law in this court. He was told he could not act as an attorney for his clients or former clients. In writing and filing briefs on behalf of otherwise pro se litigants, he violated that order. This breach existed regardless of whether he signed the briefs or inserted footnotes. Following the suspension order, Mr. Smith was prohibited from helping his clients with their briefs.

Contrary to assertions made in the response, the court has been very careful to distinguish between efforts made on behalf of clients and Mr. Smith's right to appeal sanctions issues on his own behalf. The briefs in the four cases identified asked for relief which went far beyond Mr. Smith as an individual. In 94-1127, for example, the alleged "pro se" brief requests relief in the form of reversing the district court's dismissal of certain claims and remand for an expedited jury trial on the merits. The front cover of that brief asserts it is being submitted by Mr. Qualls, not David Smith. We find it disingenuous for Mr. Smith to urge that these briefs only contained arguments personal to him.

Despite repeated warnings, Mr. Smith has chosen not to heed the orders of this court. He is, therefore, disbarred. His name will be stricken from the list of attorneys allowed to practice in this court. In addition, in accordance with Fed. R. App. P. 35(b), Mr. Smith's suggestion for hearing en banc was circulated to all judges of the court in regular active service. No member of the panel or the court has requested a poll. Therefore, the suggestion for en banc

hearing is denied. The request for evidentiary hearing is likewise denied. Mr. Smith is referred to the office of the Circuit Executive to file any desired judicial misconduct complaint.

Entered for the Court

Per Curiam

United States Court of Appeals
for the Tenth Circuit

	)	[February 16, 1996]
	)	
IN THE MATTER OF	)	Nos. 95-1091 &
DAVID L. SMITH,	)	95-1119
	)	(D.C. No. 93-DP-28)
Attorney-Appellant.	)	(D. Colo.)
	)	

ORDER AND JUDGMENT[4]

Before Tacha, Logan, and Kelly,
Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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[4]This order and judgment is not binding precedent, except under the doctrine of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

This appeal is from an order of the three-judge disciplinary panel of the United States District Court for the District of Colorado. Appellant Smith appeals pro se on numerous grounds relating to his suspension from the practice of law before this court and before the United States District Court for the District of Colorado. Appellant raises numerous grounds for his appeal relating to the application of local rules of the district court, the denial of due process in the procedures of that court and this court, and various allegations relating to the proceedings that resulted in suspension from the practice of law before the district court and this court.

This disciplinary matter has a long history in this court and in the district court. In November of 1993, a three-judge disciplinary panel of this court issued an order suspending appellant from the practice of law before the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993) (per curiam), cert. denied, 115 S.Ct. 53 (1994). Following his suspension before the Tenth Circuit, the United States District Court for the District of Colorado conducted hearings, took evidence, and reviewed records related to the actions underlying the disciplinary proceedings. The arguments that Mr. Smith makes again on appeal are, in large measure, a renewed effort to bring before this court matters that were determined previously in the original disciplinary proceeding. Appellant further alleges on appeal that various district court judges from the United States District Court in Colorado have imposed unjust and harsh sanctions against him. Finally, appellant urges that his counsel Mr. Figa, who has withdrawn from this case, failed to

represent appellant competently in connection with all of the disciplinary actions. We find no merit in any of the arguments made on appeal. We approve the disciplinary order issued by the district court for substantially the reasons given in its post-hearing order. This court recently disbarred Mr. Smith for his failure to abide by previously entered orders. In re Smith, No. 93-631 (10th Cir. Feb. 13, 1996) (per curiam). Continued attempts by this appellant to further litigate matters already determined by this court or foreclosed by previous determinations could result in the imposition of sanctions. AFFIRMED.

The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge

United States Court of Appeals
for the Tenth Circuit

GEANA J. DUNKIN,	)	[June 12, 1996]
Plaintiff,	)	
v.	)	No. 95-1087
	)	(D.C. No. 92-N-243)
	)	(D. Colo.)
LOUISIANA-PACIFIC CORPORATION; JAMES BELDIN; DOUGLAS EDDINS,	)	
Defendants-Appellees,	)	
DAVID L. SMITH,	)	
Attorney-Appellant.	)	

ORDER AND JUDGMENT[5]

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[5]This order and judgment is not binding precedent, except under the doctrine of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before Baldock, Holloway and Brorby,
Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Attorney-appellant David L. Smith appeals sanction orders entered against him by the district court and that court's refusal to vacate those orders following the parties' settlement of the underlying lawsuit. Plaintiff-appellant Geana J. Dunkin argues that the district judge should have recused, that he interfered with the attorney-client relationship, and that he abused his discretion when he stayed her case pending the resolution of her attorney's disciplinary status.

We have reviewed the record in this case and the briefs of the parties. We find that the district court was well within its discretion in imposing sanctions against Mr. Smith. Mr. Smith's argument that previous appeals to this court were not frivolous has been foreclosed by previous panels of this court. See In re Smith, 10 F.3d 723, 724 (10th Cir. 1993), cert. denied, 115 S.Ct. 53 (1994). Ms. Dunkin's arguments regarding the district court's refusal to recuse, its alleged interference with the attorney-client relationship, and its stay of her case became moot when the parties settled their underlying dispute.

Finally, the district court did not err in refusing to vacate the previously imposed sanctions. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S.Ct. 386, 393 (1994). This case does not present the exceptional circumstances which, in some instances, can support the vacatur of previous sanctions. See id.; see also Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436, 1444-45 (10th Cir. 1993).

The judgment of the United States Court for the District of Colorado is AFFIRMED.

Entered for the Court

Wade Brorby
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GEANA J. DUNKIN,	)	[June 24, 1996]
	)	
Plaintiff,	)	
	)	
and	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant,	)	
	)	
v.	)	No. 95-1087
	)	(D.C. No. 92-N-243)
LOUISIANA-PACIFIC CORPORATION, JAMES BELDIN, DAN DILWORTH, DOUGLAS EDDINS,	)	(D. Colorado)
	)	
Defendants-Appellees.	)	

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

David L. Smith hereby files his petition for rehearing and suggestion for rehearing en banc:

I. PETITION FOR REHEARING

On June 12, 1996, a three-judge hearing panel of this Court (composed of Baldock, Holloway, and Brorby, Circuit Judges) issued its (unpublished) Order and Judgment (copy

attached hereto) affirming the orders issued by United States District Judge Edward W. Nottingham. The three-judge hearing panel said:

> We have reviewed the record in this case and the briefs of the parties. We find that the district court was well within its discretion in imposing sanctions against Mr. Smith.

(Order and Judgment at page 2.) However, the three-judge hearing panel failed to address the following argument made by Mr. Smith in his brief:

> On July 9, 1992, Judge Nottingham held a hearing and granted the motions filed by the Defendants-Appellees on June 19 and 29, 1992 and July 2, 1992. (R. Vol. II., Hearing Transcript of Proceedings.) Judge Nottingham imposed sanctions (including harsh verbal reprimands) against Ms. Dunkin and/or Mr. Smith for refusing to sign the burdensome, oppressive and unconstitutionally overbroad Stipulation and Order Protecting Confidential Information proposed by Mr. Hedger, and for noticing the depositions of the 38 non-party witnesses or categories of witnesses listed in the Stipulated Scheduling and Discovery Order previously agreed to by Mr. Smith and Mr. Hedger, and ordered by Judge Nottingham. (Id.) Judge Nottingham required Ms. Dunkin to obtain approval for her depositions and other discovery requests from a United States magistrate judge before conducting any discovery in the case. (Id.) Judge Nottingham ordered the Defendants-Appellees to file their

applications for attorney fees by July 13, 1992, and set a hearing for July 16, 1992, at 6 a.m., to resolve any disputed matters relating to the applications for attorney fees. (Id.)

On July 16, 1992, Judge Nottingham held a hearing on Defendants-Appellees' applications for attorney fees, and awarded attorney fees of $4,060.00 against Mr. Smith only. (R. Vol. III., Hearing - Attorney Fees Transcript of Proceedings.) Judge Nottingham required Mr. Smith to pay this amount to the Defendants-Appellees on or before July 27, 1992. (Id.) Judge Nottingham denied Mr. Smith's request for a stay of execution on the award of attorney fees pending appeal. (Id.) Judge Nottingham issued a written order awarding "an additional fee of $481.25 for defense counsel's actual attendance at the hearing on Thursday, July 16, 1992 ($175 per hour x 2.75 hours actual hearing time)," as well as a written order "protecting confidential information," and a written "special order of reference to United States Magistrate Judge" imposing additional burdensome and illegal conditions on Ms. Dunkin's discovery in her civil rights case. (R. Vol. I., Doc. 35, 36 and 37.) Throughout Judge Nottingham's verbal and written orders, Mr. Smith was attacked, vilified and reprimanded in the harshest conceivable terms. (Id.; Vol. III., Hearing - Attorney Fees Transcript of Proceedings.) Ms. Dunkin and Mr. Smith subsequently appealed Judge Nottingham's (July 9 and July 16, 1992) orders to the United

States Court of Appeals for the Tenth Circuit. (R. Vol. I., Doc. 40.)

In his verbal and written orders, Judge Nottingham refused to follow the standards for imposing sanctions set forth in White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990). For instance, sanctions were not imposed against Mr. Smith as a means of deterring any attorney misconduct; Mr. Smith clearly presented colorable claims based on the facts and law at issue. (R. Vol. I., Doc. 30 and 31; Vol. III., Hearing - Attorney Fees Transcript of Proceedings.) Mr. Smith did not engage in sanctionable conduct by refusing to sign a burdensome, oppressive and unconstitutionally overbroad confidentiality order as a condition to receiving the documents requested in Ms. Dunkin's document request. The Defendants-Appellees failed to show "good cause" for the issuance of a confidentiality order under Fed. R. Civ. P. 26(c). Nor did Mr. Smith engage in sanctionable conduct by filing and serving Plaintiff's Notice to Take Depositions in compliance with the deposition schedule set forth in the Stipulated Scheduling and Discovery Order previously agreed to by Mr. Smith and Mr. Hedger, and ordered by Judge Nottingham.

Sanctions were imposed against Mr. Smith in an attempt to drive him out of federal civil rights practice, and to chill civil rights litigation in general, as is shown by the excessive amount of sanctions imposed. The

$4,541.25 in sanctions imposed against Mr. Smith was the amount necessary to compensate the Defendants-Appellees for their attorney fees and costs in defending the alleged "frivolous" position taken by Mr. Smith rather than the minimum amount that will serve to adequately deter any undesirable behavior. The fact that these harsh and unjustified sanctions were made immediately payable is also significant, as is the fact that only Mr. Smith was sanctioned, even though both he and Ms. Dunkin refused to sign the proposed confidentiality order and participated in the deposition scheduling. Further, since Mr. Hedger was not required to submit "meticulous, contemporaneous" time records to support Defendants-Appellees' claim for attorney fees, no valid finding was made on the appropriate amount of attorney fees and costs to be imposed against Mr. Smith.

. . .

On December 3, 1992, Judge Nottingham held a hearing and denied Ms. Dunkin's motion for reconsideration of the ruling made by United States Magistrate Judge Bruce D. Pringle on October 29, 1992, and imposed sanctions (including harsh verbal reprimands) against Ms. Dunkin and/or Mr. Smith under Rule 602C of the Local Rules of Practice of the United States District Court for the District of Colorado and/or Fed. R. Civ. P. 37. (R. Vol. V., Hearing - Discovery Disputes Transcript of Proceedings.) In his (October 29, 1992) ruling, Magistrate

Judge Pringle sustained Mr. Hedger's objection to deposition questions asked by Mr. Smith relating to discrimination against Hispanic employees of Defendant-Appellee Louisiana-Pacific Corporation. (Id.; Vol. I., Doc. 100.) At the (December 3, 1992) hearing, Judge Nottingham acknowledged that discrimination against Hispanic employees of Defendant-Appellee Louisiana-Pacific Corporation was relevant to the subject matter of the pending action under Fed. R. Civ. P. 26(b); but found and concluded that Magistrate Judge Pringle's (October 29, 1992) ruling was nevertheless not "clearly erroneous" or "contrary to law" under Local Rule 602C, which includes a provision requiring attorney fees to be assessed against the losing party on a motion for reconsideration of a magistrate's ruling. (Id.) When Mr. Smith argued that the attorney fee provision of Local Rule 602C was beyond the scope of authority granted by 28 U.S.C. § 636, Judge Nottingham indicated that Fed. R. Civ. P. 37 was an alternative basis for assessing attorney fees in this situation, and ordered the Defendants-Appellees to file their applications for attorney fees and costs against Mr. Smith only by December 8, 1992. (Id.)

On December 10, 1992, Judge Nottingham held a hearing on Defendants-Appellees' applications for attorney fees and costs, and awarded attorney fees and costs of $1,870.93 against Mr. Smith only for filing and pursuing the motion for reconsideration of Magistrate-Judge Pringle's (October

29, 1992) ruling. (R. Vol. VI., Hearing - Discovery Disputes Transcript of Proceedings.) Judge Nottingham required Mr. Smith to pay this amount to the Defendants-Appellees on or before December 16, 1992. (Id.) Judge Nottingham denied Mr. Smith's request for a stay of execution on the award of attorney fees and costs pending appeal. (Id.) Throughout Judge Nottingham's orders, Mr. Smith was attacked, vilified and reprimanded in the harshest conceivable terms. (Id.) Ms. Dunkin and Mr. Smith subsequently appealed Judge Nottingham's (December 3 and December 10, 1992) orders to the United States Court of Appeals for the Tenth Circuit. (R. Vol. I., Doc. 131.)

In his verbal and written orders, Judge Nottingham once again refused to follow the standards for imposing sanctions set forth in White, supra. Further, imposition of harsh and unjustified sanctions against Mr. Smith for filing and pursuing a meritorious motion for reconsideration of a magistrate-judge's ruling on a discovery matter improperly interfered with Ms. Dunkin's right to appeal. Thomas v. Arn, 474 U.S. 140, 146, 106 S.Ct. 466, 470, 88 L.Ed.2d 435 (1985); Moore v. United States, 950 F.2d 656 (10th Cir. 1991); Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159, 1164-65 (10th Cir. 1986); Boyd Motors, Inc. v. Employers Ins., 880 F.2d 270, 271 (10th Cir. 1989). Under the holdings in these cases, Mr. Smith was required to file a motion for reconsideration of the magistrate-judge's ruling in order to preserve the discovery issues in

> dispute for appeal to the United States Court of Appeals for the Tenth Circuit.

(Opening Brief for Attorney-Appellant David L. Smith at pages 10-15.) By failing to address the argument quoted above, the three-judge hearing panel deprived Mr. Smith of a full and fair opportunity to appeal the following issues: (1) Whether Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $4,541.25, and other harsh and unjustified sanctions, against Mr. Smith because of his and Ms. Dunkin's refusal to sign the burdensome, oppressive and unconstitutionally overbroad confidentiality order proposed by Mr. Hedger; (2) Whether Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $1,870.93, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing a meritorious motion for reconsideration of a magistrate-judge's ruling on a discovery matter.

The three-judge hearing panel said:

> Mr. Smith's argument that previous appeals to this court were not frivolous has been foreclosed by previous panels of this court. See In re Smith, 10 F.3d 723, 724 (10th Cir. 1993), cert. denied, 115 S.Ct. 53 (1994).

However, the three-judge hearing panel failed to address the following argument made by Mr. Smith in his brief:

On February 11, 1993, the Tenth Circuit issued its unpublished order dismissing for lack of jurisdiction Ms. Dunkin's and Mr. Smith's appeals of Judge Nottingham's (July 9, July 16, December 3 and December 10, 1992) sanction orders. (R. Vol. I., Doc. 149.) The Tenth Circuit imposed additional monetary sanctions against Mr. Smith only for filing alleged "frivolous" appeals of Judge Nottingham's sanction orders, and remanded the case to Judge Nottingham for a determination of reasonable attorney fees for each Defendant-Appellee for defending the alleged "frivolous" appeals. (Id.)

. . .

On November 29, 1993, a three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit issued its disciplinary order convicting Mr. Smith of filing "frivolous" appeals in four civil rights cases originally filed in the United States District Court for the District of Colorado: DeHerrera v. City and County of Denver, Civil Action No. 90-B-2260 (D. Colo.); Casillan v. Regional Transportation District, 90-S-1722 (D. Colo.); Dunkin v. Louisiana-Pacific Corporation, Civil Action No. 92-N-243 (D. Colo.); Sandlin v. Canady, Civil Action No. 92-Z-313 (D. Colo.). See In re David L. Smith, 10 F.3d 723 (10th Cir. 1993). The Tenth Circuit disciplinary panel suspended Mr. Smith from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and

the District Court are paid. Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied.

Before issuing its November 29, 1993 disciplinary order, the Tenth Circuit disciplinary panel denied Mr. Smith's request pursuant to Section 7 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit to be heard in person in defense and in mitigation with respect to the charges being brought against him by the disciplinary panel. (See also Fed. R. App. P. 46(b) and (c), requiring a hearing, if requested, before taking any appropriate disciplinary action against any attorney.) In that request, Mr. Smith said:

> Since [Mr. Smith's] case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony, . . . [Mr. Smith] requests the Disciplinary Panel to vacate the hearing and oral argument set for November 12, 1993, and to hold an evidentiary hearing [emphasis in the original] at some future date after . . . [Mr. Smith] has been given the opportunity to prepare his case. Alternatively, . . .[Mr. Smith] requests the Panel to designate a special master for purposes of conducting an evidentiary hearing.

As the direct result of the Tenth Circuit disciplinary panel's denial of an evidentiary hearing to Mr. Smith after notice and a reasonable opportunity to prepare his case, he was unable to present expert testimony or otherwise make a proper record on the issue of whether the appeals in the four civil rights cases were "frivolous." Mr. Smith was therefore deprived of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law.

The Tenth Circuit disciplinary panel's November 29, 1993 disciplinary order convicted Mr. Smith of filing "frivolous" appeals in four civil rights cases originally filed in the United States District Court for the District of Colorado. See In re David L. Smith, supra. Three of the four appeals (Dunkin, DeHerrera and Sandlin) involved the issue of whether an immediately payable district court sanction order is immediately appealable. The Tenth Circuit disciplinary panel found and concluded that this issue was foreclosed by circuit precedent prohibiting such an

appeal. See G.J.B. & Assoc. v. Singleton, 913 F.2d 824 (10th Cir. 1990).[6] However, at the time Mr. Smith filed the appeals in Dunkin, DeHerrera and Sandlin, the Supreme Court had not yet ruled on the issue of whether an immediately payable district court sanction order is immediately appealable. Indeed, the Supreme Court has still not ruled on this issue. But see McKnight v. General Motors Corporation, ___ U.S.___, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (per curiam), in which the Supreme Court held:

> The Court of Appeals correctly rejected petitioner's argument that § 101 [of the Civil Rights Act of 1991, 105 Stat. 1071, 42 U.S.C. § 1981 (1988 ed., Supp. IV)] applies retroactively. See Landgraf v. USI Film Products, 511 U.S.____ (1994); Rivers v. Roadway Express, Inc., 511 U.S. ___ (1994). However, if the only basis for the order imposing sanctions on petitioner's attorney

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[6]In G.J.B., the Tenth Circuit said: "A sanction order against an attorney currently of record is not a final decision for purposes of § 1291 appeal where the underlying controversy remains unresolved." 913 F.2d at 827. The Tenth Circuit also held that such a sanction order is not appealable under the Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) collateral order exception to the final judgment rule. 913 F.2d at 829.

> was that his retroactivity argument was foreclosed by circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal of sanctions, this Court had not yet ruled on the application of § 101 to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court. Although, as of September 30, 1992, there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous. [Citation omitted.]

Under this holding, filing an appeal was the only way Mr. Smith could preserve the issue of whether an immediately payable district court sanction order is immediately appealable pending a possible favorable decision by the Supreme Court. The answer to this question was not so clear as to make Mr. Smith's position in Dunkin, DeHerrera or Sandlin "frivolous" or sanctionable.

Furthermore, as the Tenth Circuit acknowledged in G.J.B., there was a circuit conflict on the question of whether an immediately payable district court sanction order is immediately appealable under the collateral order exception to the final judgment rule set forth in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct.

1221, 93 L.Ed. 1528 (1949). The majority of circuits permit such an appeal. See, e.g., Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3rd Cir. 1985) (leading case); Frazier v. Cast, 771 F.2d 259, 261-62 (7th Cir. 1985) (fee award imposed on attorney is appealable collateral order); TMF Tool Co., Inc. v. Muller, 913 F.2d 1185, 1189 (7th Cir. 1990) (referring to conclusion of sanctions matters as final for appealability purposes); Riverhead Sav. Bank v. National Mortgage Equity Corp., 893 F.2d 1109, 1113 (9th Cir. 1990) ("[a] sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order"); Aetna Life Ins. Co. v. Alla Medical Servs., Inc., 855 F.2d 1470, 1473 (9th Cir. 1988) ("sanction orders issued solely against non-party attorneys are immediately appealable"); Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 n. 5 (9th Cir. 1987) ("[a]n order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon imposition of the sanction."); Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 556 (9th Cir. 1986) (fee award against counsel is immediately appealable), cert. denied, 484 U.S. 823, 108 S.Ct. 85, 98 L.Ed.2d 47 (1987); DeSisto College, Inc. v. Line, 888 F.2d 755, 761-63 (11th Cir. 1989), cert. denied, 495 U.S. 952, 110 S.Ct. 2219, 109 L.Ed.2d 544 (1990) (fee award against counsel appealable); Ortho Pharmaceutical Corp. v. Sona

Distributors, 847 F.2d 1512, 1515 (11th Cir. 1988) ("[w]hen a Rule 11 sanction directs a non-party (jointly and severally with parties to the action or alone) to pay immediately--that is, before entry of final judgment--significant attorney fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order"); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1172 (D.C. Cir. 1985) (fee award against a former counsel is appealable collateral order). The answer to the question of whether an immediately payable district court sanction order is immediately appealable was therefore not so clear as to make Mr. Smith's position in Dunkin, DeHerrera or Sandlin "frivolous" or sanctionable.

The fourth appeal filed by Mr. Smith (Casillan) did not involve the issue of whether an immediately payable district court sanction order is immediately appealable; but the Tenth Circuit disciplinary panel adopted the Tenth Circuit hearing panel's conclusion that the appeal should never have been filed. While the reasons, if any, for the Tenth Circuit hearing panel's conclusion were never made clear, under the holding in McKnight, filing an appeal was, once again, the only way Mr. Smith could preserve the issues raised on appeal pending a possible favorable decision by the Supreme Court. The answers to these questions were not so clear as to make the position of Mr. Smith in Casillan "frivolous" or sanctionable.

Furthermore, in Casillan, the opposing parties and their attorneys failed to request sanctions to be imposed against Mr. Smith for filing and pursuing an alleged "frivolous" appeal; and the Tenth Circuit hearing panel that imposed sanctions against Mr. Smith failed to issue an order to show cause why sanctions should not be imposed, and failed to provide Mr. Smith with a reasonable opportunity to file a brief or otherwise be heard before sanctions were imposed--all in violation of the procedural requirements established by the Tenth Circuit in Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987). Mr. Smith was therefore deprived of his Fifth Amendment due process rights to notice that sanctions were being considered and a subsequent opportunity to respond before final judgment.

The Tenth Circuit disciplinary panel denied Mr. Smith's request to reconsider whether the appeals in the four civil rights cases were "frivolous," holding that "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." [Citations omitted.] See In re David L. Smith, supra. However, this holding was contrary to 10th Cir. R. 36.3, which provided that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or

collateral estoppel." This holding also created an irrebuttable presumption of guilt that deprived Mr. Smith of his Fifth Amendment right to due process of law.

The Tenth Circuit disciplinary panel said:

> At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may reapply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

See In re David L. Smith, supra. However, Mr. Smith is being required to pay monetary sanctions that he is financially unable to pay for filing and pursuing appeals that are not "frivolous," thus depriving him of his Fifth Amendment right to due process of law.

. . .

On February 17, 1994, Judge Nottingham held a hearing and awarded attorney fees of $17,506.50 and costs of $579.33 against Mr. Smith pursuant to the Tenth Circuit's (February 11, 1993) order. (R. Vol. VIII., Hearing - Award of Attorneys Fees and Pretrial Conference Transcript of Proceedings.)

> However, in addition to his refusal to follow the standards for imposing sanctions set forth in White, supra, Judge Nottingham refused to consider Mr. Smith's arguments that the Tenth Circuit's (November 29, 1993 and February 11, 1994) orders were void ab initio. (Id.; Vol. I., Doc. 206.)

(Opening Brief for Attorney-Appellant David L. Smith at 17, 19-27.) By failing to address the argument quoted above, the three-judge hearing panel has deprived Mr. Smith of a full and fair opportunity to appeal the issue of whether Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $18,085.83, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing alleged "frivolous" appeals of his (Judge Nottingham's) immediately payable sanction orders.

The three-judge hearing panel said:

> Finally, the district court did not err in refusing to vacate the previously imposed sanctions. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 393 (1994). This case does not present the exceptional circumstances which, in some instances, can support the vacatur of previous sanctions. See id.; see also Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436, 1444-45 (10th Cir. 1993).

However, the three-judge hearing panel failed to address the following argument made by Mr. Smith in his brief:

On November 29, 1994, Mr. Smith filed his motion to vacate the Tenth Circuit disciplinary panel's (November 29, 1993) disciplinary order, arguing inter alia that all sanctions imposed against him by the Tenth Circuit for filing immediate appeals of immediately payable District Court sanctions orders are void ab initio because of the Supreme Court's holding in McKnight v. General Motors Corp., supra. In Mr. Smith's motion to vacate, his attorney, Phillip S. Figa, said: "The McKnight case recognizes that Mr. Smith is absolutely, 100% not guilty of sanctionable misconduct for filing the interlocutory appeals with this Court which formed the basis for his suspension."

On or about January 17, 1995, Mr. Smith notified the Tenth Circuit that two of the four cases in which he had been convicted of filing alleged "frivolous" appeals had been settled, including agreement by the parties and their attorneys that the sanctions imposed against him in those cases were vacated and/or dismissed nunc pro tunc to the date of their imposition: DeHerrera v. City and County of Denver, Civil Action No. 90-B-2260 (D. Colo.) and Dunkin v. Louisiana-Pacific Corporation, Civil Action No. 92-N-243 (D. Colo.). . . . Judge Nottingham issued his memorandum opinion and order refusing to dismiss the Dunkin case on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement

that the sanctions imposed against Mr. Smith would be vacated and/or dismissed with prejudice nunc pro tunc to the date of their imposition. (R. Vol. I., Doc. 265, 267, and 268.)

. . .

On February 16, 1995, Mr. Smith appealed Judge Nottingham's (January 17, 1995) memorandum opinion and order, and all adverse rulings and orders merged in the Dunkin case, to the United States Court of Appeals for the Tenth Circuit. (R. Vol. I., Doc. 269.) In his memorandum opinion and order, Judge Nottingham said:

> I decline the parties' invitation to incorporate such a stipulation as the order of this court. Setting to one side the conceptual problem presented by the proposal that I vacate an order entered by the court of appeals (something which I believe to be beyond this court's jurisdiction), I decline on other grounds as well. I think the case analogous to U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 63 U.S.L.W. 4005 (1994), in which the United States Supreme Court held that settlement of a case on appeal does not ordinarily entitle the parties to an order vacating the lower court judgment which is the subject of the appeal, even if the parties have bargained for such an order. The sanction orders entered by this court and the court of appeals in this case

> reflect serious abuse of the discovery process by plaintiff's counsel. As I observed during one of the many discovery hearings occasioned by counsel's behavior, such abuse, if undertaken by any significant number of lawyers, would bring civil litigation to a halt. The public generally, and particularly those members of the public who use civil litigation to resolve their disputes, have a stake in conserving judicial resources by protecting the litigation process against such abuse. The sanction orders were intended not only to compensate defendants, but also to vindicate the public interest by discouraging such abuse as occurred here. While the parties may bargain away the benefits they receive under such orders, they are not entitled to bargain away the public interest by demanding that the court vacate the orders.

(R. Vol. I., Doc. 267, at pages 2-3.) However, the record clearly shows that Mr. Smith is absolutely not guilty of any "serious abuse of the discovery process" in Dunkin, DeHerrera, Casillan, Sandlin, or any other case. In addition, U.S. Bancorp involved a case that was settled after the Supreme Court granted certiorari and received briefing on the merits. The losing party in the circuit court below requested the Supreme Court to vacate the lower court's decision and dismiss the case as moot. In a unanimous decision, the Supreme Court dismissed

the case as moot, but refused to vacate the lower court's decision. The Court said that vacatur is an "extraordinary remedy" in the nature of equitable relief, and when federal courts contemplate equitable relief, they must take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole"; they are not merely "the property of private litigants." However, unlike the circuit court decision in U.S. Bancorp, the sanction orders issued by Judge Nottingham in Dunkin are not "judicial precedents." While these for-the-most-part-verbal orders are "presumptively correct," their correctness is being challenged on this appeal. They will have no value to the community as a whole unless and until the Tenth Circuit affirms or reverses them in a published opinion.

The only person who has a stake in Judge Nottingham's sanction orders in Dunkin is Mr. Smith, who the Tenth Circuit disciplinary panel has ruled "may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been satisfied." In his (January 17, 1995) memorandum opinion and order, Judge Nottingham said:

> I mentioned earlier that the sanction orders at issue consisted 'mainly' of monetary sanctions against plaintiff's counsel. The exception is the court of appeals' order suspending plaintiff's counsel from practicing law before

> that court and suggesting that the court might consider reinstatement if counsel paid the monetary sanctions imposed in this and other cases. It is this order which illustrates most vividly why the parties' request for vacatur is inappropriate in these circumstances. The court of appeals' order is premised on concerns which go beyond this case and the parties thereto. It is disciplinary in nature and reflects a judgment about Mr. Smith's conduct as counsel in this and other cases. It will be for the court of appeals to decide, if and when Mr. Smith applies for reinstatement, whether the settlement negotiated in this case constitutes compliance with the court's condition requiring him to demonstrate 'that each sanction order of . . . the district court has been satisfied." I will not accede to Mr. Smith's apparent attempt to bolster a prospective attempt at reinstatement by vacating the order imposing monetary sanctions in this case.

(R. Vol. I., Doc. 267, at pages 3-4.) However, when considered in conjunction with Judge Nottingham's role in suspending Mr. Smith from the practice of law in the United States District Court for the District of Colorado, this statement is proof positive of Judge Nottingham's intention to use sanctions as a means of driving Mr. Smith out of federal civil rights

practice, and of chilling (or freezing) the filing and pursuit of civil rights cases in general. Such a use of sanctions is a gross abuse of federal judicial power.

(Opening Brief of Attorney-Appellant David L. Smith at pages 31-37.) By failing to address the argument quoted above, the three-judge hearing panel has deprived Mr. Smith of a full and fair opportunity to appeal the issue of whether Judge Nottingham abused his discretion or otherwise acted improperly by refusing to dismiss the case on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the sanctions imposed against Mr. Smith would be vacated and/or dismissed with prejudice nunc pro tunc to the date of their imposition.

II. SUGGESTION FOR REHEARING EN BANC

I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); Moore v. United States, 950 F.2d 656 (10th Cir. 1991); Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159 (10th Cir. 1986); Boyd Motors, Inc. v. Employers Ins., 880 F.2d 270 (10th Cir. 1989); McKnight v. General Motors Corporation, ___ U.S.___, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (per curiam); Cohen

v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386 (1994); Oklahoma Radio Assocs. v. FDIC, 3 F.3d 1436 (10th Cir. 1993).

I express a belief based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance: (1) Whether Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $4,541.25, and other harsh and unjustified sanctions, against Mr. Smith because of his and Ms. Dunkin's refusal to sign the burdensome, oppressive and unconstitutionally overbroad confidentiality order proposed by Mr. Hedger; (2) Whether Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $1,870.93, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing a meritorious motion for reconsideration of a magistrate-judge's ruling on a discovery matter; (3) Whether Judge Nottingham abused his discretion or otherwise acted improperly by refusing to recuse himself from the case pursuant to 28 U.S.C. § 455(a), where his impartiality might reasonably be questioned under all the circumstances of the case; (4) Whether Judge Nottingham abused his discretion or otherwise acted improperly by addressing Ms. Dunkin directly and accusing Mr. Smith of incompetence and unprofessional behavior in an attempt to induce or intimidate her into firing him as her attorney, or to otherwise interfere with their attorney-client

relationship; (5) Whether Judge Nottingham abused his discretion or otherwise acted improperly by imposing immediately payable attorney fees and costs of $18,085.83, and other harsh and unjustified sanctions, against Mr. Smith for filing and pursuing alleged "frivolous" appeals of his (Judge Nottingham's) immediately payable sanction orders; (6) Whether Judge Nottingham abused his discretion or otherwise acted improperly by applying D.C.COLO.LR 83.6P. (which is unconstitutional on its face) to stay Ms. Dunkin's civil rights case and to vacate her jury trial date "pending resolution of plaintiff's counsel's status"; (7) Whether Judge Nottingham abused his discretion or otherwise acted improperly by refusing to dismiss the case on the terms and conditions agreed to by the parties and their attorneys in their settlement and stipulation of dismissal, including their agreement that the sanctions imposed against Mr. Smith would be vacated and/or dismissed with prejudice nunc pro tunc to the date of their imposition.

Dated this 24th day of June, 1996.

Respectfully submitted,

David L. Smith
Attorney-Appellant
1630 Welton Street
Suite 300
Denver, Colorado 80202
(303) 534-0153

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 1996, a true and correct copy of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc was placed in the United States mail, postage prepaid, addressed as follows:

Cecil R. Hedger, Esq.
HARDING & OGBORN
1200 Seventeenth Street, Suite 1950
Denver, Colorado 80202

United States Court of Appeals
for the Tenth Circuit

GEANA J. DUNKIN,	)	[August 8, 1996]
Plaintiff,	)	
v.	)	No. 95-1087
LOUISIANA-PACIFIC CORPORATION; JAMES BELDIN; DOUGLAS EDDINS,	)	
Defendants-Appellees,	)	
DAVID L. SMITH,	)	
Attorney-Appellant.	)	

ORDER
Filed on August 8, 1996

Before Baldock, Holloway and Brorby,
Circuit Judges

This matter is before the court on appellant's petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

In denying appellant's petition, we are mindful of McKnight v. General Motors Corp., 114 S.Ct. 1826 (1994), in which the Supreme Court vacated an order of the Seventh Circuit imposing sanctions for filing a frivolous appeal. The underlying case was an employment discrimination action, and plaintiff had appealed the dismissal of his claim after the Seventh Circuit had held that the Civil Rights Act of 1991 was not to be applied to cases arising before its enactment. See Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992), cert. denied, 114 S.Ct. 1641 (1994); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.), cert. denied, 506 U.S. 872 (1992). In vacating the sanctions, the Court stated:

> The Court of Appeals correctly rejected petitioner's argument that § 101 applies retroactively. See Landgraf v. USI Film Prods., 114 S.Ct. 1483 (1994); Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994). However, if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was foreclosed by circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal and sanctions, this Court has not yet ruled on the

> application of § 101 to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court. Although as of September 30, 1992, [the date of the Seventh Circuit order] there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous.

McKnight, 114 S.Ct. at 1826 (emphasis added). Appellant argues that, because there is a split in the circuits about the immediate appealability of sanction orders, and because the Supreme Court has yet to rule on the issue, he was justified in filing the premature appeals because that was "the only way [he] could preserve the issue pending a possible favorable decision by [the Supreme] Court."

The state of the law at issue in McKnight, however, was much different than the situation faced by appellant in the Tenth Circuit in 1991-92. The McKnight case involved the retroactive application of the Civil Rights Act of 1991, relatively new legislation at the time of the McKnight litigation, and legislation which had provoked much discussion regarding its effective date and whether it would apply to pending cases. Despite the fact that the Seventh Circuit had published two opinions on the issue, the issue was not completely resolved. By September 30, 1992, the date of the decision in McKnight, Mozee, and Luddington were still awaiting Court action

on pending petitions for certiorari. (The petitions were denied in both cases on October 5, 1992, and May 2, 1994, respectively.) Landgraf and Rivers were similarly in a holding pattern, waiting for action on their certiorari petitions. Those petitions were granted on February 22, 1993. Thus, the plaintiff in McKnight, on September 30, 1992, had every expectation of a reasonable chance that the Supreme Court would speak to his issue in the near future.

Appellant, however, could have had no such reasonable expectation. His appeals were clearly frivolous under the law established by this circuit in G.J.B. & Associates, Inc. v. Singleton, 913 F.2d 824 (10th Cir. 1990). At the time appellant filed his appeals from the sanction orders, there was no pending petition for certiorari in G.J.B. The other circuit cases referenced in G.J.B. dealing with the appealability of a sanction order had also long since passed the time for filing a petition for certiorari. See Sup. Ct. R. 13(1)(petition timely when filed ninety days after entry of judgment). Appellant does not identify any case which dealt with the appealability of sanctions and which was awaiting action by the Supreme Court at the time he filed his premature appeals to this court. Certainly a litigant cannot be allowed to contravene the law in this circuit regarding appealability in the offhand chance that the Supreme Court will rule his way at some future date.

As shown in the quotation from McKnight on which appellant relies, the Court did not create, nor did it mean to create, a safe harbor for any argument a litigant might make. To the contrary, the Court noted that

the issue in that case, while previously decided contrary to the petitioner's position in his circuit, had divided the district courts and "its answer was not so clear as to make petitioner's position frivolous." Id. at 1826. It is clear that this holding does not mean that a frivolous motion is immune from sanctions, nor that the lawyer may appeal adverse rulings on frivolous arguments with impunity.

The petition having been denied on the merits by the panel to which the case was submitted, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

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Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 92-N-242 [August 19, 1996]

GEANA J. DUNKIN,

Plaintiff,

v.

LOUISIANA-PACIFIC CORPORATION; JAMES BELDIN; DOUGLAS EDDINS,

Defendants.

ORDER

This matter is before the court on the mandate of the United States Court of Appeals for the Tenth Circuit, filed in this Court on August 19, 1996. The court of appeals affirmed this court's imposition of sanctions upon Attorney David L. Smith. In order to establish a date certain for payment of the sanctions, it is

ORDERED that Mr. Smith shall pay the sanctions imposed in this case within ten days of the date of this Order.

Dated this 19th day of August, 1996.

BY THE COURT:

EDWARD W. NOTTINGHAM
United States District
Judge